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- The draft International Convention on the Protection of all Persons against Enforced Disappearances would prohibit secret detention and establish a non-derogable right not to be subject to an enforced disappearance.
- It is likely to be adopted by consensus by the 47 members of the Human Rights Council this Thursday.
- The Council will transfer the instrument to the United Nations General Assembly for final adoption at its upcoming 61st session this Fall.
- Following adoption, the instrument will be open for signature by States at a signing ceremony to be held in Paris.
- A binding instrument on disappearances, if it enters into force, would follow on related provisions in the International Covenant on Civil and Political Rights (to which the United States is a party) and on the non-binding Declaration on the Protection of all Persons against Enforced Disappearances, which was adopted by the UNGA in 1992.
- The proposed convention is the product of five formal negotiating sessions at the Commission on Human Rights beginning January 2003 which chaired by the French Ambassador in Geneva Amb. Kessadjian.
- The Chair of the treaty negotiations exhibited enormous dedication, skill and industriousness throughout the negotiations, which were conducted in an atmosphere of collegiality and respect.
- The Latin and EU countries provided strong support for the initiative.
- The United States and many other States were active throughout the negotiations including Japan, Russia, China, Angola, Algeria, India, Pakistan, Canada and New Zealand.
- Non-governmental organizations and families of the disappeared were extremely engaged throughout the negotiations, bearing witness to the crime and strongly shaping the instrument.
- At the same time the United States regrets that the negotiations did not result in a consensus instrument.
- The United States has expressed its views on the draft instrument in various documents made publicly available including its Written Statement at the HRC (on the Mission Geneva website), a compendium of textual changes proposed to the instrument during the course of the negotiations (on the mission Geneva

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website) and in the Closing Statement of the United States delivered at the conclusion of negotiations in October 2005 (reproduced at pages 48-49 of the official UN Report on the Fifth Negotiating Session). [John, you have been provided with all these documents.]

- The United States is not a member of the HRC, and we take no position on adoption of the instrument by the Council.
- We will take a position on adoption when the draft convention is considered by the UNGA this fall.
- I do not know what our position will be at the UNGA, as it will be subject to an inter-agency review process.
- Our legal concerns include an imprecise definition and the inclusion of several criminal law provisions that would be difficult to implement in a federal system such as our own.
- Our legal concerns include the following:
 - The absence of an express requirement for intentionality in the definition. (States interpret the definition to include an implicit intent requirement, as do we.)
 - The failure to use an existing treaty body for monitoring functions.
 - An apparent requirement to enact an autonomous crime of enforced disappearance (which would be difficult in a State like the United States with 51 criminal jurisdictions).
 - A statute of limitations provision that is not workable in a federal system.
 - A *non-refoulement* provision that is at odds with principles of *non-refoulement* found in the Refugee Convention and Convention against Torture.
- The draft convention will enter into force upon ratification by twenty States.
- Were the United States to become a party, the Convention would not provide the rules governing United States policies in the war against Al Qaida, as Article 43 of the Convention contains an express international humanitarian law savings clause.
- Under Article 43, IHL would provide the rules governing the war against Al Qaida and would remain the *lex specialis* in situations of armed conflict and other situations where IHL applies.

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